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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 36

DAVID D. JACKSON, ET AL., PETITIONERS

v.

NORTHWEST AIRLINES, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The first opinion of the United States District Court for the District of Minnesota (R. 431) is reported at 70 F. Supp. 501. The second opinion (R. 609) is reported at 75 F. Supp. 32, and the third (R. 663) at 76 F. Supp. 121. The opinion of the United States Court of Appeals for the Eighth Circuit (R. 734) is reported at 185 F. 2d 74.

JURISDICTION

The judgment of the court of appeals was entered on January 23, 1951 (R. 762). The time for filing the petition for a writ of certiorari was ex-

tended until April 30, 1951, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether in the circumstances of this case the ruling of the Chairman of the National Railway Labor Panel forbidding respondent's adoption of a forty-hour workweek for certain of its employees was a ruling of an "agency of the United States" within the meaning of Section 9 of the Portal-to-Portal Act.

2. Whether respondent's failure to pay petitioners on the basis of a forty-hour workweek was in good faith in reliance on that ruling.

STATUTE AND EXECUTIVE ORDERS INVOLVED

Sections 9 and 10 of the Portal-to-Portal Act (Act of May 14, 1947, 61 Stat. 84, 29 U. S. C. §§ 258, 259) and pertinent portions of Executive Orders No. 9172, May 22, 1942 (7 F. R. 3913, 3 C. F. R. Cum. Supp. 1164) and No. 9299, February 4, 1943 (8 F. R. 1669, 45 U. S. C. § 156, Note), are set forth in the Appendix, *infra,* pp. 23-28.

STATEMENT

1. *Background.* The facts giving rise to this dispute were found by the district court to be as follows: Respondent, Northwest Airlines, Inc., was, until 1942, engaged exclusively in operating a commercial airline (R. 686). Its employees were, consequently, subject to Title II of the Railway Labor Act (45 U.S.C. § 181) and exempted from the Fair

Labor Standards Act by Section 13(a)(4) of the latter statute (29 U.S.C. § 213(a)(4)). They were accordingly paid on the basis of a forty-eight hour workweek. In February, 1942, respondent, at the request of the United States, began to modify bomber planes at the St. Paul, Minnesota, Airport (R. 686). Subsequently, a general contract covering the modification work and other war projects upon which respondent was engaged was executed by respondent and the Government on a cost plus fixed fee basis (R. 686-687). All of the petitioners were employed at the Modification Center at St. Paul (R. 687).

When the modification work was first undertaken it was done by regular airline employees and, for at least a short time thereafter, some employees were employed on both modification work and regular airlines work (R. 688). The project rapidly expanded, however, and, at its close, about 5,500 persons were employed at the Modification Center alone compared to the approximately 900 persons employed on regular airlines work when the project began (R. 688-689). Although the modification project was eventually physically separated from the airlines operation (R. 688-689), the project employees were carried on respondent's regular payroll and were processed for employment and treated generally for administrative purposes in the same manner as regular employees (R. 687).

2. *Administrative rulings.* In August, 1942, Local 134 of the UAW-CIO petitioned the National Labor Relations Board to certify a collective bargaining representative for the employees at the Modification Center (R. 98). After a hearing, the Board, on February 13, 1943, dismissed the petition for want of jurisdiction (R. 99), holding that the modification project was not an enterprise "separate and distinct" from the regular airlines business and refused to pass on the dispute because it did not clearly appear that "the National Mediation Board, the agency primarily vested with jurisdiction by the terms of the Railway Labor Act, has declined to assume jurisdiction over the operations here involved" (R. 104). At about the same time the Wage-Hour Administrator, after first indicating that the project employees were subject to the Fair Labor Standards Act,[1] stated in a letter to the counsel for the Air Transport Association, of which respondent was a member, his "position on the interpretation of the section 13(a)(4) exemption of the Fair Labor Standards Act" (R. 398). After declaring that he believed he should be guided by the decision of the National Labor Relations Board in the representation pro-

[1] The Administrator's earlier opinion is contained in an intra-departmental memorandum, dated October 15, 1942, from the Acting Administrator to the Regional Administrator in response to an inquiry from the latter. It was reported at 5 Wage and Hour Reporter 945. It is not included in the Record but is set forth in part at p. 5 of the Petition.

ceeding involving the employees of Northwest Airlines, he said (R. 399-400):

> It is my position therefore that so long as activities carried on by air lines in pursuance of contracts executed with Government agencies for the duration of the war and in furtherance of the prosecution of the war bear a reasonably close relationship to the primary air transport operations for which the air lines have been created, the Wage and Hour Division in its enforcement of the Fair Labor Standards Act will apply the provisions of the section 13(a) (4) exemption to employees engaged in such activities.
>
> * * * * *
>
> Nothing in this letter should, of course, be construed as limiting the rights of employees under section 16(b) of the Fair Labor Standards Act to bring suit against their employers to recover unpaid minimum wages and overtime compensation.

On March 2, 1943, a suit for overtime compensation under the Fair Labor Standards Act was instituted by certain employees at the Modification Center (R. 395). Respondent, in accordance with the requirements of its contract with the Government, notified the Contracting Officer of the suit, enclosing a copy of the Wage-Hour Administrator's letter of February 26, 1943 (R. 396). Respondent stated that, in view of that letter and the National Labor Relations Board decision, the suit

was unlikely to succeed but pointed out that should any liabilities arise as a result of the suit respondent would expect to be reimbursed by the Government (R. 397). On April 6, 1943, respondent advised the Contracting Officer that the United States Attorney who had been conducting the defense of that suit had withdrawn from the case at the request of the Labor Department and requested instructions on whether it should proceed on the basis of a workweek of forty or forty-eight hours (R. 400-402). On April 19, 1943, the Army Air Forces advised respondent that, in view of prospective changes which would, it was believed, sufficiently segregate the bomber modification work from the airline's activities to take the St. Paul Modification Project out from under the Railway Labor Act, and in view of a belief that placing the project on a 40-hour workweek would improve labor relations and increase production, the change to such a workweek, with its attendant changes in rates of compensation, met with the approval of the contracting agency (R. 402-404).

On April 30, 1943, respondent notified its employees that subject to a contrary ruling by a government agency or a change in the statutes, the Modification Center would function under the Fair Labor Standards Act as soon as appropriate permission was obtained (R. 349). Respondent then asked the Regional Director of the National War Labor Board to approve its adoption of a forty-

hour workweek (R. 354). In its application respondent stated that changes in methods of production and operation had occurred, and that "We have been advised that these changes in methods of production have brought such activities within the ambit of the Wage and Hour Act" (R. 354). The Regional Director ruled that "on the basis of the facts above stated" the changeover to the Wage and Hour Act was permissible (R. 355).

The problem being "so tangled up with these various agencies", on May 4, 1943, one of respondent's officers conferred with William M. Leiserson, Chairman of the National Railway Labor Panel, who was thought to have jurisdiction over the subject in so far as respondent was concerned, concerning the changeover from the 48 to the 40 hour week (R. 356). As a result of that conference, letters were exchanged on that day by respondent and Chairman Leiserson (R. 357-362). Chairman Leiserson informed respondent that the modification center was "covered by the Railway Labor Act" and that "the proposed payment of time and one-half for overtime after forty hours per week cannot now be approved" (R. 361-362). Inasmuch as respondent thereafter continued the rates of pay previously approved by the Chairman on the basis of a 48-hour workweek, with the concurrence of the contracting agency (R. 406-409), the Chairman was not obligated to and did not convene an Emergency Board (see pp. 14-15, *infra*).

On May 17, 1943, respondent posted a notice at the St. Paul Modification Center, in which it advised its employees that the request to operate on the basis of a forty-hour workweek had been denied by the Chairman of the Panel (R. 363-364).[2] Thereafter, respondent continued to operate on the basis of a forty-eight hour workweek (R. 372-373).

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[2] This notice to employees read as follows:

On April 30, 1943, a notice was posted at the St. Paul Modification Center stating that, on and after April 1, 1943, with the permission of the War Department and subject to the approval of the proper Federal authorities, employees of the Modification Center, with the exception of supervisory employees, would receive time and one-half for all time in excess of forty hours per week or in excess of eight hours per day and that our existing contract with the Air Line Mechanics Association, International, was in the process of adjustment. Our present contract with the Air Line Mechanics Association, International, had been approved by the National Railway Labor Panel and accordingly authorization was requested of the Chairman of the National Railway Labor Panel, to pay our employees at the Modification Center, with the exception of supervisory employees, time and one-half for time in excess of forty hours per week or in excess of eight hours per day. The Chairman of the National Railway Labor Panel claimed and exercised jurisdiction of all of our employees and, referring to Executive Orders of the President, denied our request. Thereafter, the War Department withdrew its authorization permitting Northwest Airlines, Inc. to operate on a forty-hour week and pay time and one-half for overtime in excess of forty hours per week and in excess of eight hours per day and notified Northwest Airlines, Inc. for the time being to continue to pay its employees as in the past and as of prior to April 1, 1943, on the basis of a forty-eight hour week, straight time. Accordingly, our employees at the Modification Center will continue for the time being to receive pay as in the past and as of prior to April 1, 1943, on the basis of a forty-eight hour week, straight time.

On May 31, 1943, Local 134 UAW-CIO petitioned the National Labor Relations Board for reconsideration of its former decision (R. 105, 372) and on August 3, 1943, the Board reaffirmed its previous decision holding that the "Company's bomber modification project is so integrated with its carrier activities as to preclude a finding that the project is a separate and distinct enterprise" (R. 366-372).

On March 5, 1945, respondent requested a ruling from the Labor Department on the application to respondent's activities of Executive Order 9240, which provided for the payment of a premium wage for work "relating to the prosecution of the war" performed on the seventh day of a regularly scheduled workweek (R. 412-415). On March 9, 1945, the Labor Department replied that the St. Paul Modification Center was subject to the Executive Order (R. 636). The communication also stated that the matter had been discussed with the Wage-Hour Administrator and with the Secretary of the National Mediation Board (R. 637). This ruling was based upon the assumption that "the employees at this project did not perform any function in connection with the normal transportation activities" of the company (R. 416). Thereupon, respondent again requested the advice of the contracting agency, and was instructed on March 31, 1945, that it should continue to operate under the Railway Labor Act (R. 410-411). On

June 1, 1945, the Labor Department withdrew its determination of March 9, 1945, and advised respondent that, after careful study of all the facts developed, it had concluded that Executive Order 9240 was not intended to apply to the St. Paul Modification Project (R. 413, 415-417, 635-653).

3. *History of these cases.* These suits were brought in 1945 on behalf of 2,547 employees of the Modification Center (R. 4-21). Pursuant to stipulation between the parties the district court first heard and decided the issue of whether or not the work performed by petitioners was outside the coverage of the Fair Labor Standards Act by reason of the air-carrier exemption set forth in Section 13(a) (4) of that Act (R. 32). The district court, on January 18, 1947, held that the modification work was not within the Section 13(a) (4) exemption (R. 431). Similarly, the court heard and decided the question of whether or not petitioners were engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act (R. 472). Again, on October 9, 1947, the district court decided that question in favor of petitioners (R. 609). After passage of the Portal-to-Portal Act, respondents moved for leave to file an amended answer to allege defenses under Sections 9 and 11[3] of the Portal-to-Portal

[3] Section 11 of the Portal-to-Portal Act (29 U.S.C., Supp. III, § 260) provides:

> In any action commenced prior to or on or after the date of the enactment of this Act [May 14, 1947] to recover unpaid minimum wages, unpaid overtime

Act (R. 604). The motion was granted (R. 607), the issues argued, and on February 9, 1948, the district court rendered its decision (R. 663). With respect to the Section 11 defense the court found that the failure to comply with the requirements of the Fair Labor Standards Act was in good faith and that respondent had reasonable grounds for believing it was not in violation of that Act (R. 691). The court held, therefore, that petitioners were not liable for liquidated damages under Section 16(b) of the Fair Labor Standards Act (R. 692). With respect to the Section 9 defense the district court found specifically that respondents had relied in good faith on the ruling of Mr. Leiserson, the Chairman of the National Railway Labor Panel (R. 690) (see p. 18, *infra*), but held that that ruling was not agency action within the meaning of Section 9 (R. 692) and, accordingly, that respondent was liable for the amount of unpaid overtime (R. 693).

Respondent appealed and the court of appeals agreed with the district court that the Section 13(a) (4) exemption was inapplicable (R. 739) and that respondent was engaged in the produc-

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compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 16(b) of such Act.

tion of goods for commerce (R. 740). On the Portal-to-Portal issue, however, the court of appeals, while adopting the district court's finding on the good faith issue (R. 745), held that the ruling of the Chairman of the National Railway Labor Panel was agency action within the meaning of Section 9 (R. 749). The court of appeals, therefore, reversed and remanded for entry of judgment against petitioners (R. 749).

ARGUMENT

Of the two issues presented by petitioners, one is largely, and the other wholly, factual: the first is whether in these circumstances the ruling of the Chairman of the National Railway Labor Panel was agency action within the meaning of Section 9 of the Portal-to-Portal Act; the second is whether respondent relied in good faith on the ruling. The case does not involve any novel question of law requiring authoritative determination by this Court, and a decision by this Court would be significant only to the parties involved. Indeed, since Section 9 of the Portal-to-Portal Act applies only to acts or omissions occurring "prior to the date of the enactment of this Act" (May 14, 1947), the present problem cannot arise again. After that date, the Act recognizes reliance only upon rulings of the Wage and Hour Administrator. (Section 10(b)(1).) Moreover, only one similar case is pending. In any event, the conclusion of the court of appeals that

the ruling of the Chairman was agency action upon which respondent relied in good faith is correct and should not be reviewed by this Court.

1. a. The district court held that the emergency boards provided for in Executive Order 9299, and not the Chairman of the Railway Labor Panel, constituted the agency authorized to act, and that therefore the latter's ruling was not agency action within the meaning of the Portal-to-Portal Act. In so holding, the district court misread the Executive Order.

The National Railway Labor Panel was created by Executive Order No. 9172, May 22, 1942 (7 F.R. 3913, 3 C.F.R. Cum. Supp. 1164), "for the duration of the war and six months thereafter" to adjust disputes not referable to the National Railroad Adjustment Board. By Executive Order No. 9299, February 4, 1943 (8 F.R. 1669, 45 U.S.C. § 156, Note) (*infra,* Appendix p. 25), it is provided that with certain exceptions not relevant here, no carrier can make any changes in wage rates "unless notice of such proposed change shall have been filed with the Chairman of the National Railway Labor Panel * * * and shall have been permitted to become effective as hereinafter provided." Paragraph 3 of that Executive Order provides:

> 3. If the Chairman of the National Railway Labor Panel has reason to believe that the proposed change, in wage rates or salary, may not

> conform to the standards prescribed in Executive Order No. 9250, or to the general stabilization program made effective thereunder, or to the directives on policy issued by the Economic Stabilization Director thereunder *and the proposed change is not modified to conform to such standards, program, and directives,* he shall designate three members of the Panel as an Emergency Board to investigate the proposed change and to report to the President. *Otherwise, the Chairman of the Panel may permit the proposed change to become effective.* [Italics added].

Paragraph 5 provides that a copy of the Emergency Board's report must be filed with the Economic Stabilization Director, among others and that, unless the latter shall otherwise direct, the Board's recommendation with respect to the proposed change in wage rates shall become operative thirty days after the report is filed with the President.

The language of Executive Order No. 9299 permits of no other interpretation than that given it by the court of appeals. The wages of employees subject to the Railway Labor Act cannot be changed without the approval of the Chairman of the Panel. The proposed wage change must, in the first instance, be acted on by him. If he approves, no further action by the Panel is called for. If he disapproves and the applicant acquiesces in his ruling, there is, similarly, no occasion for other action by the Panel. In either case the action of the

Chairman is the only "agency" action provided by law. Only where the Chairman disapproves the proposed change *and his ruling is not complied with* is there any occasion for the designation of an Emergency Board. True, in such a case, the Chairman's ruling is not final. But in every case the Chairman must rule first and where, as here, the applicant complies with his ruling it is the final action of the Panel. The opinion of the court of appeals supplies a complete answer to the contention that the Chairman's ruling was not the formal action of the Panel (R. 748-749):

> [T]he fact that if [The Chairman's ruling] is complied with there is no necessity for the Emergency Board compels the conclusion in our judgment that the Chairman's action is formal and is, unless disregarded, the final ruling of the Agency. To hold otherwise would require that anyone submitting a proposed schedule of wages for approval, under these Executive Orders would be required, before it could rely upon a ruling as the ruling of the Panel, that it not only submit the schedule to the Chairman but that it must obtain the disapproval of the Chairman, that it must then see that an Emergency Board is created, that the Emergency Board rule upon it, that the Board then file its recommendations and findings with the Director of Economic Stabilization and the President, and that it must then wait 30 days to see if the Stabilization Director reversed the Board or if the President reversed the Director of Economic Stabilization.

b. Petitioners do not seem to argue very strenuously [4] against the conclusion of the court of appeals "that the ruling of the Chairman of the National Railway Labor Panel was, under the facts of this case, the administrative ruling of the Panel" (R. 749). Instead they place their main emphasis on the argument that because the courts below have now held erroneous the Chairman's ruling that the Panel had jurisdiction under the Railway Labor Act over the employees at the Modification Center, the ruling—whether by the Panel as a whole, the Chairman, or the Emergency Board—is not within the purview of Section 9 of the Portal-to-Portal Act. This argument flies squarely in the face of the language of Section 9 which provides unequivocally that reliance may have been on the action of "any agency of the United States"; and that a defense based on such action shall be good even if that action is subsequently "determined by judicial authority to be invalid or of no legal effect."

Without mentioning this clause of Section 9, petitioners argue that because the error of the Chairman may be characterized as jurisdictional, Section

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[4] Petitioners' entire argument on this point consists of a statement of a conclusion (Pet. 23):

> Although it was clear from the executive orders defining the powers of the Railway Labor Panel that, as the trial court held, only an emergency board could rule upon proposed wage changes, the Court of Appeals held that the Chairman of the Railway Labor Panel acting erroneously and, individually constituted "an agency of the United States," under the Portal Act.

9 is inapplicable. But the language of the clause just quoted does not suggest that Congress was seeking to draw the elusive line between jurisdictional and other error. Here the area of the agency's authority was not so remote from the subject matter of the ruling as to make suspect the good faith of an employer relying on it. The authority granted the Chairman of the Railway Labor Panel by Executive Order 9299 undoubtedly included the power to determine—at least in the first instance—whether the case fell within his jurisdiction. This Court has consistently held, in the analogous situation involving judicial decisions, that an unreversed determination of a jurisdictional question, whether or not erroneous, is *res judicata*. *Treinies* v. *Sunshine Mining Co.*, 308 U.S. 66, 77; *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381, 403; *Stoll* v. *Gottlieb*, 305 U.S. 165, 171; cf. *United States* v. *United Mine Workers*, 330 U.S. 258, 292. Congress clearly would have intended that principle to be applicable here.

2. Petitioners' arguments in support of the proposition that this was not agency action are largely directed to the issue of good faith reliance. Even assuming that their arguments were persuasive, this Court has often said that it will not review a fact-finding of the district court which has been adopted by the court of appeals. *Comstock* v. *Group of Investors*, 335 U.S. 211; *United States* v. *Dickinson*, 331 U.S. 745.

The district court in its finding XI specifically found (R. 690):

> On or about May 4, 1943, the Chairman of the National Labor Railway Panel advised defendant, after defendant made inquiry of him, that the modification project must be operated pursuant to the Railway Labor Act, not the Fair Labor Standards Act, as defendant had requested. *Defendant acted in conformity with, and in reliance on, that opinion in good faith.* The denial to defendant of the right to pay its modification employees according to the Fair Labor Standards Act was not submitted by the Chairman of the Panel to an Emergency Board or any other board or persons. The powers of the Chairman were granted by Executive Orders. (Italics added).

It concluded, however, that the action of the Chairman was not agency action under Section 9 (R. 692). Petitioners could not, of course, appeal from that finding, but they did challenge it in an effort to sustain the judgment. (Brief for Appellees, p. 34). Despite their challenge, it was adopted by the court of appeals (R. 745). There is no sound reason why this Court should reexamine that finding.

Petitioners' argument (Pet. pp. 27-32) that the finding related to good faith under Section 11 and not under Section 9, and that therefore the court of appeals erred in adopting it to support its judgment, is insupportable. In the first place, they

completely fail to document their statement that "good faith" as it is used in Section 9 has a different meaning than "good faith" as used in Section 11. The natural presumption would seem to be that the phrase was used in its ordinary sense in both Sections and that it was intended to have the same meaning in both. But whatever the intention of Congress in that respect, the district court in this case made *two* findings of good faith. The first, Finding XI, was made almost precisely in the language of Section 9 of the Portal-to-Portal Act: "Defendant acted in conformity with, and in reliance on, that opinion in good faith" (R. 690). The second, Finding XIII, was in the language of Section 11 of the Act: "Defendant's failure to pay its employees according to the Fair Labor Standards Act * * * was in good faith, and defendant had reasonable grounds for believing in good faith that such failure was not a violation of the Fair Labor Standards Act of 1938, as amended" (R. 691). The requirements of Section 9 and Section 11 are different. To escape liability completely under Section 9 there must be good faith conformance with and reliance on some administrative action. To escape liability for liquidated damages, under Section 11, there need only be good faith and reasonable grounds for believing in good faith that the act or omission complained of was not a violation of the Fair Labor Standards Act. The purpose of the district court in making sepa-

rate findings, one in the words of Section 9, and the other in the words of Section 11 is obvious. Finding XI could only have been intended as a finding of good faith under Section 9 and Finding XIII as a finding of good faith under Section 11.

Petitioners' arguments that there could not have been good faith in this case, as a matter of law, are unpersuasive. They rely heavily on discussions of this particular case on the floor of the House, during the debate on the Portal-to-Portal Act, to show that in the opinion of certain Congressmen the defense of good faith would not be available to respondent.[5] But the question of good faith in a particular case was left for the courts to decide (see *Lassiter* v. *Guy F. Atkinson Co.*, 176 F. 2d 984 (C.A. 9)), and they cannot decide it by weighing the opinions of legislators reached on the basis of an incomplete presentation of the facts of the dispute. The remarks of the Congressmen during the course of the debate are not controlling. Cf. *Schwegmann Bros.* v. *Calvert Distillers Corp.*, decided May 21, 1951, Nos. 442-443, 1950 Term.

3. Petitioners also contend that even if the Chairman's ruling was agency action on which respondent relied in good faith it cannot excuse

[5] On the floor of the Senate, a contrary opinion was expressed with respect to the question whether respondent could, under the Senate version of the bill, in which the good faith defense pertained only to liquidated damages, escape liability for liquidated damages. 93 Cong. Rec. 2240, 80th Cong. 1st Sess. Senator Wherry, author of the Senate provision, was of the opinion that respondent would not be liable for liquidated damages.

violations of the Fair Labor Standards Act prior to May 4, 1943, the date on which it was issued. We submit that this contention is insubstantial and is based on a strained reading of Section 9. It seems most unlikely that Congress intended that an employer should be forgiven violations of the Fair Labor Standards Act occurring subsequent to an administrative ruling and not be forgiven the violations toward which that ruling was directed. In any event that question is certainly no longer of importance to anyone except the parties to this case.

The case of *Asselta* v. *Madison Ave. Corp.*, 90 F. Supp. 442, 18 Labor Cases 65,772, 65,792 (S. D. N. Y.), on which respondents rely, presented a totally different fact situation. There, the employer was, after the decision of the Court of Appeals for the Second Circuit in *Fleming* v. *Arsenal Bldg. Corp.*, 125 F. 2d 278, on notice that he was in violation of the Fair Labor Standards Act. The district court simply held that he could not be forgiven for any violation between the time he was put on notice and the time of his reliance on a subsequent administrative ruling. That situation sharply contrasts with this case where it had never definitely been determined that respondent was violating the Fair Labor Standards Act. On the contrary, when respondent attempted to change the wage-rates to comply with the Act it was forbidden to do so.

CONCLUSION

For the reasons set forth above, we respectfully submit that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.

HOLMES BALDRIDGE,
Assistant Attorney General.

SAMUEL D. SLADE,
ARTHUR W. MURPHY,
Attorneys.

Of Counsel:
LINUS J. HAMMOND,
Attorney for Northwest Airlines, Inc.

JUNE, 1951

APPENDIX

Sections 9 and 10 of the Portal-to-Portal Act, Act of May 14, 1947, (61 Stat. 84, 88-89, 29 U.S.C. §§ 258, 259) provide as follows:

SEC. 9. RELIANCE ON PAST ADMINISTRATIVE RULINGS, ETC.—In any action or proceeding commenced prior to or on or after the date of the enactment of this Act based on any act or omission prior to the date of the enactment of this Act, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation, of any agency of the United States, or any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

SEC. 10. RELIANCE IN FUTURE ON ADMINISTRATIVE RULINGS, ETC.—

(a) In any action or proceeding based on any act or omission on or after the date of the

enactment of this Act, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the agency of the United States specified in subsection (b) of this section, or any administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

(b) The agency referred to in subsection (a) shall be—

(1) in the case of the Fair Labor Standards Act of 1938, as amended—the Administrator of the Wage and Hour Division of the Department of Labor;

(2) in the case of the Walsh-Healey Act —the Secretary of Labor, or any Federal officer utilized by him in the administration of such Act; and

(3) in the case of the Bacon-Davis Act— the Secretary of Labor.

Executive Order No. 9172, May 22, 1942, (7 F.R. 3913, 3 C.F.R. Cum. Supp. 1164), provides, in pertinent part, as follows:

> 1. There is hereby created, for the duration of the war and six months thereafter, a National Railway Labor Panel of nine members, hereinafter referred to as the Panel, to be appointed by the President, and to be qualified as to membership thereon in the same manner as provided in Section 10 of the Railway Labor Act for membership on emergency boards. The President shall designate a chairman from the members of the Panel and shall fill vacancies thereon as they may occur. The Chairman of the Panel shall receive such compensation, together with necessary travelling expenses, as the President may prescribe. The members of the Panel shall receive necessary travel expenses and subsistence expenses or per diem allowances in lieu thereof on such days as they are actually engaged in performance of duties pursuant to this Order.

Executive Order No. 9299, February 4, 1943 (8 F.R. 1669, 45 U.S.C. § 156, Note), provides as follows:

> By virtue of the authority vested in me by the Constitution and statutes of the United States, and more particularly by the act of October 2, 1942 (Public Law 729, 77th Congress), it is hereby ordered:
>
> 1. No increases in the wage rates or salary of any employee subject to the provisions of the Railway Labor Act, whether granted as a

result of voluntary agreement, collective bargaining, conciliation, arbitration, or otherwise, and no decreases in such wage rates or salary, shall be made except in accordance with the provisions of this order; *Provided, however,* That nothing contained in this order or Executive Order No. 9250 shall be construed as affecting the procedure or limiting the jurisdiction of either the National Mediation Board, as defined in the Railway Labor Act, or the National Railway Labor Panel, as defined in Executive Order No. 9172, except as herein specifically set forth.

2. No carrier shall make any change in wage rates, except such changes as by general order of the National War Labor Board, or by regulations of the Commissioner of Internal Revenue, are permitted to be made without the specific approval of the Board or the Commissioner, as the case may be, unless notice of such proposed change shall have been filed with the Chairman of the National Railway Labor Panel, created by Executive Order No. 9172, and shall have been permitted to become effective as hereinafter provided.

Notwithstanding § 4001.2 of the Regulations of the Economic Stabilization Director, for the purpose of determining what wage and salary adjustments may be made without any specific approval, the general orders of the National War Labor Board shall be applicable to all employees subject to the Railway Labor Act, except those receiving salaries at the rate of $5,000 or more per annum in regard to whom the regulations of the Commissioner of In-

ternal Revenue shall apply. But any adjustment of salary under $5,000 heretofore approved by the Commissioner shall not be affected by this order.

3. If the Chairman of the National Railway Labor Panel has reason to believe that the proposed change, in wage rates or salary, may not conform to the standards prescribed in Executive Order No. 9250, or to the general stabilization program made effective thereunder, or to the directives on policy issued by the Economic Stabilization Director thereunder and the proposed change is not modified to conform to such standards, program, and directives, he shall designate three members of the Panel as an Emergency Board to investigate the proposed change and to report to the President. Otherwise, the Chairman of the Panel may permit the proposed change to become effective.

4. Emergency Boards, whether designated pursuant to the Railway Labor Act, Executive Order No. 9172, or section 3 of this order, in reporting to the President shall certify that their recommendations in regard to any proposed change affecting wage and salary payments conform with the standards prescribed in Executive Order No. 9250, the general stabilization program made effective thereunder, and with the directives on policy issued by the Economic Stabilization Director thereunder.

5. Copies of the report with recommendations made to the President by any Emergency

Board under section 4 of this order shall be filed by the Board forthwith with the Economic Stabilization Director, the National War Labor Board and the Commissioner of Internal Revenue. The Economic Stabilization Director may on behalf of himself or other departments and agencies concerned, report to the President the effect of the recommendations on the general stabilization program. Unless and except to the extent that the Economic Stabilization Director shall otherwise direct, the recommendations of the Emergency Board in regard to proposed changes affecting wages and salary payments shall, upon the expiration of thirty days after the report is filed with the President, become effective.

6. The National War Labor Board and the Commissioner of Internal Revenue shall either rule on any application for approval of wage and salary adjustments now before the Board and the Commissioner or transfer it to the Chairman of the National Railway Labor Panel. The Board and the Commissioner shall not rule on any application hereafter made.

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